STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2006
v	No. 261557 Wayne Circuit Court
LABARON ALEXANDER DAVIS, Defendant-Appellant.	LC No. 04-008323-01

Before: Whitbeck C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, assault with the intent to commit great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

Defendant first argues that the prosecutor's failure to ensure that the police properly investigated the case before the prosecutor proceeded with the charges against him violated his constitutional due process rights. Defendant failed to properly preserve this argument by objecting in the trial court on the ground he asserts on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). We review unpreserved claims for plain error affecting the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is merited only if the plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the defendant's innocence. *Id.*

A decision to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. *People v Jones*, 252 Mich App 1, 6-7, 10; 650 NW2d 717 (2002). A prosecutor has broad discretion to charge a defendant so long as the charge is supported by the evidence. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of armed robbery are: (1) an assault, and (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a specified weapon

or any article used or fashioned in a manner to lead the person assaulted to reasonably believe it to be a dangerous weapon. *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); MCL 750.529. The elements of assault with intent to do great bodily harm less than murder are: (1) an assault through an attempt or offer with force and violence to do corporal hurt to another with (2) a specific intent to do great bodily harm less than murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). An assault is an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). "Circumstantial evidence and reasonable inferences drawn therefrom the evidence may be sufficient to prove the elements of a crime." *Id*., p 656.

The prosecutor had eyewitness testimony from Hill Robertson and Eric Robertson. Both stated that defendant prevented Hill from entering her car, fought Hill for her purse, demanded Hill give him her money, and hit Hill with the butt of his gun at least three times before finally obtaining Hill's purse and fleeing the scene. Out of a photo lineup of six individuals, Hill immediately and confidently identified defendant as the person who assaulted and robbed her. And, defendant admitted that he called Dan Craig, whose number was listed on Hill's cell phone records after the phone was stolen during the incident in question. The evidence presented adequately supported the charges, and the prosecutor did what was in his power to show the whole transaction, as it was. *Ford*, *supra*, p 458; *Lugo*, *supra*, p 710. The prosecutor did not violate defendant's due process rights. *Johnson*, *supra*, p 723.

Defendant next argues that the trial court abused its discretion when it instructed the jury that defendant could be alternatively convicted of the charged crimes as an aider and abettor. We review a trial court's determination whether a jury instruction is applicable to the facts of the case for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 174 (2006). A criminal defendant is entitled to have a properly instructed jury consider the evidence presented. *Hawthorne*, *supra*, p 57. Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories which are supported by the evidence. *Id*., p 51.

We review jury instructions in their entirety. There is no error requiring reversal if the instructions sufficiently protected the defendant's rights and fairly represented to the jury the issues to be tried. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994). It is error requiring reversal to give an instruction on aiding and abetting when there is no evidence to support that charge. *People v Parks*, 57 Mich App 738, 743; 226 NW2d 710 (1975). An aiding and abetting instruction is proper if there is evidence that more than one person was involved in the commission of a crime and the defendant's role in the crime might have been less than direct participation in wrongdoing. *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995).

Defendant told Officer Richard Buyse that he drove Elton Jones home after he saw Jones running down the street with people chasing him, and saw Jones with a black purse on his person. Defendant testified that he was driving himself and Jones to Henry Ford Hospital so that defendant could ask his sister, who worked at the hospital, if she could give him some money. Defendant specifically stated that he parked at Subway, purchased a sandwich, returned to his running car to eat his sandwich, and then let Jones in his car even though a customer that defendant had seen in Subway was chasing Jones. Defendant also testified that he drove Jones to his residence, despite that fact that defendant saw that Jones had a bloody hand, had a purse

under his coat, and Jones had told defendant that he just robbed someone. This evidence could lead a trier of fact to believe that more than one person was involved in the commission of a crime (defendant and Jones) and that defendant's role in the crime might have been less than direct participation in the wrongdoing (defendant might have just been the getaway driver). The trial court did not abuse its discretion when it instructed the jury that defendant could be alternatively convicted of the charged crimes as an aider and abettor. *Head, supra*, p 211.

Defendant argues that he is entitled to a new trial because the jury returned a general verdict of guilty of armed robbery and did not specify under which theory it convicted defendant. Defendant states this is error because insufficient evidence exists to support the alternative aiding and abetting theory. We review sufficiency of the evidence claims de novo, reviewing the evidence presented in a light most favorable to the prosecution and determining whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Anyone who intentionally assists someone else in committing a crime is as guilty as the person who directly commits it and can be convicted of those crimes as an aider and abettor. *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). To prove aiding and abetting of a crime, a prosecutor must show: (1) that the crime charged was committed by the defendant or some other person; (2) that the defendant performed acts or gave encouragement which assisted in the commission of the crime; and (3) that the defendant intended the commission of the crime or had knowledge of the other's intent at the time he gave the aid or encouragement. *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004). An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). A defendant's intent "is a question of fact to be inferred from the circumstances by the trier of fact." *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995).

The prosecutor presented evidence establishing that Hill was a victim of an armed robbery. MCL 750.529; *Ford, supra*, p 458. The prosecutor's evidence supported the inference that defendant was the individual who committed the armed robbery on Hill, while defendant's testimony suggested that Jones committed the armed robbery on Hill. In either case, a rational trier of fact could have found that "defendant or some other person" committed armed robbery. Further, a rational trier of fact could have found that defendant "performed acts or gave encouragement" that assisted in the commission of the armed robbery. Because a rational trier of fact could infer that defendant intended the armed robbery or had knowledge of Jones' criminal intent at the time he gave Jones aid or encouragement, sufficient evidence existed to support an armed robbery conviction on an aiding and abetting theory. *Moore, supra*, p 67; *Carines, supra*, p 758; *Ford, supra*, p 458; *Kieronski, supra*, p 232.

Defendant asserts that Hill's in-court identification of defendant was based on an impermissibly suggestive pretrial photo lineup. As a result, defendant argues that the trial court erred when it failed to sua sponte suppress Hill's identification testimony. Defendant failed to properly preserve this issue by moving the trial court to suppress the identification or moving for a hearing regarding the suggestiveness of the prior identification. *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). We review this claim for plain error affecting defendant's substantial rights. *Carines, supra*, pp 763, 773.

"If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness' in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based on a sufficiently independent basis to purge the taint of the illegal identification." *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). A photographic identification procedure can be so suggestive as to deprive the defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Factors to consider when determining whether a photo lineup is unduly suggestive include the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. *People v Kurylczyk*, 443 Mich 289, 306, 318; 505 NW2d 528 (1993). The display of a single photograph combined with an indication that the person depicted has been arrested for the offense can be unduly suggestive. *Gray*, *supra*, p 111.

Hill viewed a photo lineup because defendant, who was already a suspect, was not in custody and therefore was unavailable to participate in a live lineup. The photo array consisted of six pictures including defendant and five other photos chosen by Officer Eric Wymer. Wymer testified that he selected the pictures in an attempt to match defendant's physical description "as best as possible." Evidence shows that the police did not tell Hill whom to pick and did not inform her of who they suspected was the assailant. The police merely placed pictures of six different individuals in front of Hill and asked if she recognized anyone. Hill immediately recognized defendant's face, and identified him as the perpetrator. Hill stated she saw her assailant's face because he was only inches away from her when he robbed and assaulted her. Buyse stated that Hill had no hesitation when she identified defendant.

Defendant points out that the photographic identification was approximately five months after the robbery and assault occurred. Defendant also mentions that he was the only individual in the photo lineup that was wearing a white t-shirt in his photograph. However, given the facts in favor of a finding that the photo lineup was not unduly suggestive, and the fact that when defendant assaulted and robbed Hill, he was not described as wearing a white t-shirt, but rather, a tan or brown coat and a gray hooded sweatshirt, we conclude that the pretrial photo lineup was not so impermissibly suggestive that it could have led to a substantial likelihood of misidentification. *Gray, supra*, p 111; *Kurylczyk, supra*, pp 306, 318. Therefore, it was not plain error for the trial court not to sua sponte suppress Hill's identification testimony. *Hornsby, supra*, p 466; *Colon, supra*, p 304.

Defendant next argues the trial court erred when it allowed the introduction of hearsay testimony. We review a trial court decision whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. *Id.*; MRE 802.

Buyse testified that after he reviewed Hill's cell phone records, he called Craig. Buyse stated that Craig gave him information about who had called him. Buyse used this information in combination with the description of Hill's assailant to prepare a photo lineup including defendant's picture for Hill's review. Defendant's argument that the challenged testimony was inadmissible hearsay fails because Buyse's testimony did not relate any out of court statements. *Tanner, supra,* p 629. The trial court did not abuse its discretion when it allowed Buyse's testimony into evidence. *People v Geno,* 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

Defendant next argues that he was denied his constitutional right to the effective assistance of counsel. Defendant failed to properly preserve this claim by raising a motion for a new trial or an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004), overruled on other grounds 474 Mich 48 (2006). When reviewing an unpreserved claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, our review is limited to the facts contained on the record. *People v Rodriguez,* 251 Mich App 10, 38; 650 NW2d 96 (2002). As a matter of constitutional law, we review the record de novo. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id*. at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v Dixon,* 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id*. Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

First, because the pretrial photo lineup was not so impermissibly suggestive that it could have led to a substantial likelihood of misidentification, it did not preclude Hill from making an in-court identification of defendant. *Colon, supra,* p 304. A motion to suppress Hill's in-court identification of defendant would have been futile, and thus, defendant was not denied his right to the effective assistance of counsel when defense counsel did not move for suppression of Hill's in-court identification of defendant. *Ackerman, supra*, p 455; *Ish, supra,* pp 118-119.

Next, defendant's argues that he was denied his right to the effective assistance of counsel when defense counsel failed to present an expert witness to testify regarding identification. Hill was absolutely certain that defendant was the man that robbed and assaulted her because he was inches away from her during the incident. Buyse and Wymer testified that Hill positively identified defendant during the photo lineup without hesitation. Eric testified that he was certain that defendant was the person who robbed and assaulted Hill. In light of this conclusive evidence, declining to present additional expert witness testimony regarding the

identification did not deprive defendant of a substantial defense because it would not have affected the outcome of the proceedings. *Dixon, supra*, p 398. There was no error.

Finally, defendant argues that he was denied his right to the effective assistance of counsel when defense counsel failed to invoke MCL 767.93 to produce Craig as an out of state witness. A court may issue a certificate to compel a "material" out of state witness to attend court proceedings. MCL 767.93. A review of the record reveals that Craig was not a "material" witness. Defendant was not denied his right to confront Craig because Buyse did not relay any statements that Craig made during their phone call. At the very most, Buyse's testimony relating to Craig may have implied that Craig told Buyse that defendant called him, but defendant admitted to that during his own testimony. In any event, defendant has presented no indication that Craig could have provided any evidence that would have affected the outcome of the proceedings. Defendant was not denied his right to the effective assistance of counsel when defense counsel failed to invoke MCL 767.93 to produce Craig as an out of state witness. *Toma*, pp 302-303.

Defendant's final argument on appeal is that cumulative effect of the errors denied him a fair trial. Because defendant has not established any error, there is no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio